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CONSTITUTION

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 424

MEMPHIS NATURAL GAS COMPANY,

Appellant,

vs.

GEORGE F. McCANLESS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, AND J. C. JOHNSON, CONSTABLE OF SHELBY COUNTY, TENNESSEE

Appellees

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a). There was drawn in question in the Supreme Court of Tennessee the validity of several statutes of Tennessee on the ground that they are repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity.

The late Mr. Chief Justice Stone stated in *Charleston Federal S. & L. Assn.* v. *Alderson*, 324 U. S. 182:

> "It is essential to our jurisdiction on appeal under Paragraph 237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws."
>
> • • • • • • •
>
> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

The appellant complied in the Supreme Court of Tennessee with the foregoing requirements as specifically pointed out in II hereof.

The final judgment of the Supreme Court of Tennessee was entered on the 4th day of May, 1946.

The facts involved are not in dispute and may be briefly stated as follows:

This suit was filed in the Chancery Court of Davidson County, Tennessee by the Memphis Natural Gas Company on October 2, 1939 to recover $12,540.48 representing inspection fees exacted of it by a distress warrant for the years 1937, 1938 and 1939 upon the ground that it is a public utility subject to the control and jurisdiction of the Railroad and Public Utilities Commission and liable for inspection, control and supervision fees required of all public utilities doing business in Tennessee.

The Memphis Natural Gas Company contended that it is not a public utility under the common law, and further that it is not a public utility as defined in the Tennessee statutes. It contended that the State statutes, as applied, are repugnant to the Federal Constitution and laws and

violate Amendment XIV of the United States Constitution "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" and also violate the Commerce Clause, Article I, Section 8 of the United States Constitution that Congress shall have the power to "regulate commerce . . . among the several States."

The Memphis Natural Gas Company is a private Delaware corporation, domesticated in Tennessee, owning and operating a pipe line which originates in Louisiana, passes through Arkansas and Mississippi and terminates in Tennessee. Its general offices are in Memphis. The natural gas transported by it is wholly owned by the pipe line corporation and it transports no natural gas for others. The natural gas is sold at wholesale in Louisiana, Arkansas, Mississippi and Tennessee to distributing companies. The pipe line corporation distributes no gas in either Tennessee or the other States. Obviously a large part of the pipe line's gross receipts are derived from sources outside of Tennessee. The Tennessee statutes in question and applied to the pipe line corporation require the payment of fees for the maintenance of the State Commission measured by the gross receipts of the public utility. The fees are exacted for the maintenance of the State Commission and its staff.

The Tennessee statutes in question creating the State Commission impose upon the Commission and its staff the customary duties for the inspection, control, supervision and regulation of all public utilities as defined in the statutes. The definition includes "gas, electric light, heat, power, water, telephone, telegraph or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses or agreements, granted by the State or by any political subdivision

thereof," etc., and further directs "the provisions of this statute shall be construed to apply to and affect only public utilities which furnish products or services within the state," etc.

Your pipe line corporation insisted in the suit brought by it that it is not a public utility under the common law and that it is not a public utility under the statutory definition, but the trial court construed and applied the statutes to appellant in such manner that this private interstate pipe line corporation has been classified a public utility subject to the control and regulation of the State Commission as to all of its activities, and required to contribute a very large annual sum for the maintenance of the State Commission. This conclusion was reached by the trial court in the face of the undisputed fact that the charter of the corporation plainly shows that it is a private corporation in no sense dedicated to the public use, does not profess to serve the public, and does not possess by charter or otherwise the customary rights of eminent domain and other similar rights enjoyed by public utilities.

The undisputed facts show that the appellant had in the years involved, 1937, 1938 and 1939, two customers in Tennessee to which the pipe line corporation sold at wholesale the natural gas solely owned by the pipe line corporation and transported by it from Louisiana to Tennessee. The two customers were the Memphis Power & Light Company, a New Jersey corporation domesticated in Tennessee, which distributed the gas in Memphis and Shelby County, and the West Tennessee Power & Light Company, a Florida corporation domesticated in Tennessee, which distributed the gas to the public in several other Tennessee counties. At the time this suit was instituted there was pending in the courts of Tennessee a very important suit between the Memphis Natural Gas Company and the State

of Tennesssee involving the question of the pipe line corporation's liability for income taxes. The proof was voluminous and detailed everything pertaining to the pipe line corporation's activities in Tennessee. The principal issue in the suit was the construction of the contract between the pipe line corporation and the Memphis Power & Light Company. To avoid duplication of work, it was stipulated in this present suit that all of the facts found and determined by the Supreme Court of Tennessee and the Supreme Court of the United States in the income tax suit shall be considered a part of the proof in this present suit as the income tax suit involves the same years here involved. In this manner *Memphis Natural Gas Company* v. *Pope*, 178 Tenn. 580, and the appeal therefrom, *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, are a part of the proof in this suit (R. 60).

The trial court construed *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, to mean in substance that this private pipe line corporation is a public utility and predicated its decision upon this proposition. The Supreme Court of Tennessee affirmed for the same reason and applied the Tennessee statutes to appellant.

There is nothing in either of said decisions to support the conclusion that appellant is a public utility or that there is factual basis to apply to appellant the Tennessee statutes presently in question. The same is true of the other proof in this cause.

In said decisions it was held that the contract between the pipe line corporation and the Memphis Power & Light Company provided in substance that the pipe line corporation had a profit-sharing arrangement with the Memphis Power & Light Company, the distributing company, and was therefore engaged in intrastate commerce and liable for income taxes. The contract was construed to mean that the

pipe line corporation obligated itself to transport the gas to Tennessee and sell it wholesale to the Memphis Power & Light Company, which, in turn, obligated itself to distribute and sell the gas at retail in Memphis and Shelby County. At the end of the year the two corporations, pursuant to the contract, pooled their respective net incomes from the gas sold by the pipe line corporation to the Memphis Power & Light Company which in turn was resold by it to the public. This profit-sharing contract and the decisions construing it plus the further fact that the pipe line corporation is domesticated in Tennessee and secured at the time of the construction of the pipe line permits to lay the pipe line under various highways and roads have been held sufficient in this present case to transform this private pipe line corporation into a public utility in violation of the Fourteenth Amendment and the Commerce Clause of the Constitution.

The contract of the pipe line corporation with the West Tennessee Power & Light Company (the distributor outside of Shelby County) did not have the profit-sharing feature and was therefore not drawn into the litigation involving income taxes.

On October 17, 1945 the trial court rendered the adverse decision. An appeal was perfected to the Supreme Court of Tennessee, which, on the 4th day of May, 1946, affirmed.

Absence of attorneys in the armed forces delayed the initial trial.

Repeatedly the Supreme Court of Tennessee, in its opinion, states that the pipe line corporation's charter "gave it power to do business as a public utility." This is extreme error. The original charter of June 11, 1928 did in substance so provide, but the charter was amended a few weeks later on August 7, 1928 and the right to transport "gas or oil for the public generally as well as

for the use of said corporation" was eliminated. (Exhibit 1 to Johnson's Deposition.) Appellant emphasized in its brief in the Supreme Court of Tennessee the undisputed fact that there is nothing in the charter giving it the right to serve the public, but the Supreme Court of Tennessee, as shown by its opinion, completely overlooked this undisputed fact and predicated its decision largely on the ground that the corporation is by charter a public utility. Such action where the fact is not in dispute *ipso facto* is a violation of the Fourteenth Amendment.

The appellant also complained in the state court that there was not at any time during the years involved any inspection, control, supervision or regulation of any of its properties in Tennessee by the Commission or any of its representatives. The appellant introduced evidence that during the years involved there was no inspection and therefore the exaction of the fees was on a fictitious basis and could not be justified as a lawful exercise of the State's police power. The evidence on this point is not in dispute, but the Supreme Court of Tennessee found that the pipe line corporation's witnesses "testified that inspections were made" (Opinion, p. 30). This is extreme error and to find a fact inconsistent with undisputed evidence violates the Fourteenth Amendment. (Johnson's Deposition, R. 27, 35; Dearth's Deposition, R. 56.)

The pipe line corporation further complained in the state courts that both prior to and since the passage of the Federal Natural Gas Act, June 21, 1938, c. 556, Par. 1, 52 Stat. 821, 15 USCA 717, an interstate pipe line corporation such as this is not subject to state regulation because of the Commerce Clause of the Federal Constitution. It is undisputed that since the passage of said Act the appellant has recognized and conformed to the jurisdiction of the Federal Power Commission over it. A violent collision

of Federal regulation and state regulation results from the Tennessee decision.

The application of the Tennessee statutes to the pipe line corporation was unconstitutional under the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

It makes no difference that the pipe line corporation was engaged, in part, in intrastate commerce by virtue of the profit-sharing contract. Doing some intrastate business will not transform a private corporation into a public utility unless the corporation professes to serve the public and is actually doing so. The undisputed facts are that the pipe line corporation does not distribute any gas to the public and mere ownership of a part of the profits made by the distributing company, Memphis Power & Light Company, cannot transform a private corporation into a public utility without violating important and substantial Federal constitutional rights.

II. State Statutes the Validity of Which Are Involved

There was thus drawn in question the validity, under the Fourteenth Amendment and Commerce Clause, of certain statutory provisions of the State of Tennessee as follows:

> Chapter 49, Section 3 of the 1919 Public Acts of Tennessee as amended by Section 1, Chapter 42 of the 1935 Public Acts of Tennessee, Tennessee Code 5448:
>
> "'PUBLIC UTILITIES' DEFINED.—The term 'public utility' is defined to include every individual, copartnership, association, corporation, or joint stock company, their lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any

other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof;" (remainder irrelevant and not copied).

Chapter 49, Section 10 of 1919 Public Acts of Tennessee, Tennessee Code 5456:

"PROVISIONS APPLY TO WHAT UTILITIES.—The provisions of this statute shall be construed to apply to and affect only public utilities which furnish products or services within the state, and this statute shall not be construed to extend to any public utility engaged in interstate commerce for the government or regulations of which jurisdiction is vested in the interstate commerce commission or other federal board or commission."

Chapter 107, Section 1 of 1921 Public Acts of Tennessee, Tennessee Code 5459:

"FEE FOR INSPECTION, CONTROL, ETC., OF UTILITIES.—Every public utility doing business in this state and subject to the control and jurisdiction of the railroad and public utilities commission to which the provisions of this statute apply, shall pay to the State of Tennessee on or before April 1st of each year, a fee for the inspection, control, and supervision of the business, service, and rates of such public utility."

Chapter 107, Section 1 of 1921 Public Acts of Tennessee as amended by Section 1, Chapter 139 of the 1935 Public Acts of Tennessee, Tennessee Code 5461:

"FEE MEASURED BY GROSS RECEIPTS; RATES FIXED.—The amount of such fee is to be measured by the amount of the gross receipts of each public utility in excess of five thousand dollars. The fee fixed and assessed against and to be paid by each public utility is as follows: $3.00 per $1,000.00 for the first $1,000,000.00 or less of such gross receipts over $5,000.00; 75 cents

per $1,000.00 for each additional $1,000.00 of such gross receipts over and above $1,000,000.00."

III. Date of Judgment and Appeal

The final judgment and opinion of the Supreme Court of Tennessee rendered on the 4th day of May, 1946, plainly sustained the constitutionality of the above Tennessee statutes as applied to appellant, and in violation of the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

Petition for appeal to this Court was presented to the Honorable Chief Justice Grafton Green of the Supreme Court of Tennessee on the 30th day of July, 1946 and was by him allowed the same day.

IV. Manner in Which Federal Questions Were Raised

The applicability of the statutes to appellant was challenged in the original complaint by setting forth therein the statutes and challenging their applicability to appellant (R. 1).

The Federal questions were raised in the Supreme Court of Tennessee by assignments of error, brief and argument as permitted by the state practice.

The assignments of error so made in the Supreme Court of Tennessee were:

> "The Chancery Court erred in dismissing the bill for the recovery of the inspection fees paid under protest and thereby holding the Company liable for inspection fees because:
>
> "1. The Memphis Natural Gas Company was not a public utility during the years involved.
>
> "2. It was not subject to the control and jurisdiction of the Railroad and Public Utilities Commission.
>
> "3. It was not the kind of corporation to which the provisions of the statutes relating to public utilities apply.

"4. There was no inspection, control and supervision of the business, service and rates of the Memphis Natural Gas Company as there was no legal basis for any such inspection, control and supervision and to impose upon a private interstate pipe line corporation a charge of $12,540.48 for three years fictitious inspection, control and supervision of such a company to maintain the State Commission is a violation of Amendment XIV of the United States Constitution 'nor shall any State deprive any person of life, liberty or property without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"5. The imposition of this heavy annual burden upon such a private corporation and the conversion of a private corporation by legislative and commission fiat into a public utility violates Amendment XIV of the United States Constitution 'nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"6. The imposition of this heavy annual burden upon such a private corporation engaged in the interstate transportation of natural gas for sale at wholesale to distributing companies is a direct burden upon interstate commerce and an unlawful interference with interstate commerce which violates Article I, Section 8 of the United States Constitution that Congress shall have power to 'regulate commerce * * * among the several States.'

"7. The fee schedule provided in Code 5461 is in effect a gross receipts tax. The fee schedule is $3.00 per $1,000.00 for the first $1,000,000.00 of gross receipts and 75 cents per $1,000.00 of gross receipts above $1,000,000.00. If an interstate corporation, private or public, is subject to any regulation by Tennessee or any of its agencies such as the Railroad and Public Utilities Commission, the State may exact of such corporation only actual reimbursement of expenses incurred by the

State in the lawful exercise of its police powers. There was never at any time during the years involved any so-called inspection, control or regulation of the Memphis Natural Gas Company by the Commission and therefore any imposition of fees upon the interstate pipe line corporation necessarily violates Amendment XIV of the United States Constitution and Article I, Section 8 of the United States Constitution because the State and none of its agencies incurred any expenses and did nothing with reference to the Memphis Natural Gas Company and therefore no expenses were incurred for which reimbursement can be claimed.

"8. Because it also violates Article I, Section 21 of the Constitution of Tennessee 'that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor.' "

Pages 3, 4 and 5 of the Assignments of Error, Brief and Argument by Appellant in the Supreme Court of Tennessee.

The opinion of the Supreme Court of Tennessee, appended to this statement, affirmatively shows that the Federal questions were presented to, considered and decided by it. Said opinion states in part with reference to the decree and judgment of the trial court that it

"is assailed by the assertion that the Memphis Natural Gas Company was not, during the years in question, (1) a public utility, (2) subject to control of the Railroad and Public Utilities Commission, (3) nor a corporation to which statutes relating to public utilities apply; that therefore, the inspection was both illegal and fictitious and the imposition of the fees therefor, was violative of the rights of the Gas Company under the 'due process' (Amendment XIV) and 'commerce' (Art. I, sec. 8) clauses of the United State Constitution, and of Art. I, sec. 21 of the Constitution of Tennessee; and

that finally, the inspection fee is in effect, a gross receipts tax, not based on costs and expenses incurred by the State, in lawful discharge of the police powers and, therefore, the imposition of this tax on the Gas Company violates the 'due process' and 'commerce' clauses of the United States Constitution."

* * * * * * *

"The first three sub-sections of the assignment of error are overruled, and we hold that in its operation during the three years preceding April 1, 1939, the Gas Company was a public utility, subject to regulation and control by the Railroad and Public Utilities Commission, and subject to all statutes of Tennessee having to do with public utilities."

Opinion of Supreme Court of Tennessee, (Pages 22, 28).

V. The Federal Questions Involved Are Substantial

The Supreme Court of Tennessee decided that this interstate private pipe line corporation is a public utility and must assist in supporting the State Commission because of the facts found in *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, which seems in no sense to justify the transformation of a private corporation into a public utility and the taking of private property for public purposes without due process of law, a denial of the equal protection of the laws and the subjugation of an important interstate property to local regulation.

The other proof in this record is merely corroborative of the facts found and determined by the Supreme Court of the United State in said decision.

It is true said decision found that the contract between the pipe line corporation and the Memphis Power & Light Company, the distributing agency, was of such a nature that it could be said the pipe line corporation was doing

some intrastate business in Tennessee because it was entitled, pursuant to the contract, to a part of the profits made by the Memphis Power & Light Company from the sale and distribution of gas. Being entitled to receive at the end of each year a part of the profit made by another corporation does not cause the recipient corporation to become a public utility. The gist of the decision by the Supreme Court of the United States is:

> "The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis (Power & Light) Company of its franchise to distribute gas to consumers, and execution of the contract was a condition of the grant of the franchise. By the contract the Memphis (Power & Light) Company undertook to establish its distribution system. Taxpayer (pipe line corporation) undertook to construct its pipe line with facilities, including measuring stations, at a delivery point, for supplying the Memphis (Power & Light) Company with a varying flow of gas into the service pipes as and when required by the Memphis (Power & Light) Company for consumer needs.
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> • • • • • • •
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> "At the end of each year the combined net surplus or deficit of the two companies was to be divided between them by a cash settlement.
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> • • • • • • •
>
> "We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's (pipe line corporation) delivery of gas into the mains of the Memphis (Power & Light) Company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer

> (pipe line corporation) did not do such a business in the state as to be taxable there, or that the profits derived from it are not an appropriate measure of the tax." (Parenthetical insertions ours.)

The Supreme Court of Tennessee held, however, in the present appeal that the foregoing quotation means that the pipe line corporation "had, jointly with the Memphis Power & Light Company, a contract with the City of Memphis to furnish natural gas to all citizens of that municipality." (Opinion, page 22). It therefore applied the statutes of Tennessee to appellant and concluded that it is a public utility, which is at variance with all of the proof in the record.

In *Producers Transportation Co.* v. *Railroad Commission of State of California,* 251 U. S. 228, it is said:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

See also *Michigan Public Utilities Commission, et al.* v. *Duke,* 266 U. S. 570, in which a private interstate motor carrier was subjected to the jurisdiction of the State Commission but the Supreme Court of the United States said it could not be done.

> "This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier and so directly to burden and interfere with it."

It makes no difference, however, whether the private corporation sought to be regulated is in intrastate or interstate business, as the criterion is whether or not it is in fact a public utility. If it is a private corporation, intrastate or interstate, it cannot be converted into a public utility by legislative fiat or judicial action such as reflected by the opinion of the Supreme Court of Tennessee without violating constitutional rights.

In *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, an ice manufacturing corporation of Oklahoma distributing ice locally was subjected to regulation by the State Commission on the theory that it was a public utility. The Supreme Court would not permit it and said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, 44 S. Ct. 412, 413, 68 L. Ed. 813, 32 A. L. R. 661, and authorities cited; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204."

It is also stipulated in this suit that the facts found and appearing in *Memphis Natural Gas Co.* v. *McCanless*, 180 Tenn. 688, be considered a part of the proof in this present suit (Stipulation, R. 60). The case just mentioned, 180 Tenn. 688, involved the liability of the pipe line corporation for a gross receipts tax imposed for the privilege of distributing natural gas. The gross receipts taxes involved were for the years 1937, 1938 and 1939, which are the

same years involved in this present appeal. The Supreme Court of Tennessee found for a fact—

> "The distributing agencies (Memphis Power & Light Company) pay the complainant (pipe line corporation) for the gas taken by them at these various connections and the complainant (pipe line corporation) has nothing to do with the distribution and sale of the gas by such agencies." (Parenthetical insertions ours.) (Page 691)

Obviously there is no dispute about the fact that the pipe line corporation does not distribute gas and renders no service to the public, has no charter power to serve the public, does not possess the right of eminent domain or the other attributes common to public utilities.

But the Supreme Court of Tennessee applied the statutes to appellant and found facts in direct conflict with the undisputed facts, and decided many important Federal questions in a way which conflicts with applicable decisions of this court.

The presumption of constitutionality cannot suffice to sustain the applicability of the statutes to appellant in view of the undisputed facts which the Supreme Court of Tennessee has erroneously applied.

The Supreme Court of Tennessee held without justification that:

> "The Gas Company was operating under privileges and franchises from the City of Memphis, seven West Tennessee counties, and the State of Tennessee through its Highway Department, and that the scope of the powers granted the corporation in its charter, gave the corporation the right to operate as a public utility." (Opinion, p. 25.)

The charter gives no such right. It is undisputed that the pipe line corporation holds no franchise from the City

of Memphis to distribute gas. As shown by this court's decision in *Memphis Natural Gas Co.* v. *Beeler, supra,* the franchise was granted to the Memphis Power & Light Company, the distributing agency. In addition, the other proof in this present appeal, consisting in part of the deposition by Mr. Johnson, president of the pipe line corporation, shows that the pipe line corporation has never held any franchise from either the City of Memphis, the State of Tennessee or any agency thereof (R. 27). The pipe line corporation is domesticated in Tennessee and did get permits for the pipe line to be constructed under highways and roads. Permits to do these things do not result in the surrender of important Federal rights guaranteed by the Constitution. The State may not use these things as an excuse to subject a private corporation to public regulation.

It is said in *Williams* v. *Standard Oil Co.,* 278 U. S. 235, where Tennessee tried to subject the Standard Oil Company to the jurisdiction of the State Commission:

> "Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well-settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the federal Constitution."

The Supreme Court opinion recognizes that the fees exacted are "to create a fund out of which the cost of administering public utilities in Tennessee should be paid" (Opinion, p. 29) such as the customary duty of fixing rates, appraisal of properties, employment of rate experts, attorneys, clerks, etc. They are not exacted to protect the public health and safety against dangerous physical conditions, and therefore are not fees collected under the

State's police power to exact from interstate properties reasonable compensation for the inspection of such properties and the prevention of dangerous conditions.

Since the passage of the Natural Gas Act in 1938, *supra*, the Federal Power Commission is charged with the duty of doing all of these things for the regulation of interstate pipe line corporations. Before passage of the Act the States had no right to regulate such pipe line corporations. This was stated by the late Mr. Chief Justice Stone in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, Footnote 1:

> "However in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of congressional action, not subject to state regulation."

The State of Tennessee insists, however, that it shall regulate this interstate pipe line and invade the Federal field. The Supreme Court ignored many Federal decisions, plainly holding that this interstate pipe line corporation is not subject to local regulation, and ignored particularly *Kentucky Natural Gas Corporation* v. *Public Service Commission of Kentucky*, 28 Fed. Supp. 509 and *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corporation*, 119 F. (2) (6 C., 1941), 417 dealing with a substantially similar situation as that at bar, and in which both of said courts held that both before and subsequent to the passage of the Natural Gas Act an interstate pipe line corporation which does not distribute gas locally cannot be subjected to State Commission control and regulation as such action violates the Commerce Clause.

It is respectfully submitted that the numerous Federal questions here involved are substantial and important, and

they have been decided by the Supreme Court of Tennessee in a manner inconsistent with the decisions of the Supreme Court of the United States as well as the other Federal Courts.

It is not appellant's insistence that the state statutes are unconstitutional in toto, but are unconstitutional as applied to the undisputed facts and this appellant.

See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, in which the principle is stated upon which appellant relies:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

VI. It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code as amended.

July 30, 1946.

——— ———,
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APPENDIX

FOR PUBLICATION, GAILOR, J.

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

v.

GEORGE F. MCCANLESS, Commissioner of Finance & Taxation, et al.

Opinion

This is a suit by the Gas Company to recover back inspection fees imposed under Code Section 5459, in the sum of $12,540.48 for the three years ending March 31, 1939. After a distress warrant was issued, the inspection fees were paid under protest, and the bill filed on October 2, 1939, for their recovery. The Defendant filed an answer. The Gas Company took its proof in May 1940, and after some delay on account of the induction of several State's Attorneys into military service, and the desire of the Gas Company to await the outcome of other litigation in which it was involved with the State, the case was set and submitted to the Chancellor on the depositions of Complainant and certain additional stipulations of fact. We quote in the course of the opinion some excerpts from these stipulations, but note at the outset, that it was expressly agreed that all of the facts appearing in the following decisions of cases in which the Memphis Natural Gas Company had been a party, shall be treated as part of *Complainant's* proof in this cause: Memphis Nat. Gas Co. *v.* Pope, 178 Tenn., 580; Memphis Natural Gas Co. *v.* Beeler, 315 U. S., 649, 86 L. ed., 1090; Memphis Nat. Gas Co. *v.* McCanless, 180 Tenn., 688; Memphis Nat. Gas Co. *v.* McCanless, 180 Tenn., 695. After the Chancellor had delivered a careful and comprehensive opinion which is preserved in the record, a decree was entered dismissing the bill, and the Complainant, Gas Company, has perfected its appeal to this Court.

In the brief filed by Appellant, there is apparently a single assignment of error which fails to conform with Rule 14, 174 Tenn., 873, et seq., in which the action of the Chancellor in dismissing the bill, is assailed by the assertion that the Memphis Natural Gas Company was not, during the years in question, (1) a public utility, (2) subject to control of the Railroad and Public Utilities Commission, (3) nor a corporation to which statutes relating to public utilities apply; that therefore, the inspection was both illegal and fictitious and the imposition of the fees therefor, was violative of the rights of the Gas Company under the "due process" (Amendment XIV) and "commerce" (Art. I, sec. 8) clauses of the United States Constitution, and of Art. I, sec. 21 of the Constitution of Tennessee; and that finally, the inspection fee is in effect, a gross receipts tax, not based on costs and expenses incurred by the State, in lawful discharge of its police powers and, therefore, the imposition of this tax on the Gas Company violates the "due process" and "commerce" clauses of the United States Constitution.

We consider first, the contention of the Gas Company that it was not for the three years ending March 31, 1939, a public utility subject to control and regulation by the Public Utilities Commission, nor amenable to statutes applying to public utilities in Tennessee.

Code Section 5448 defines a public utility, for the purpose of control and regulation by the Commission, as including common carriers of gas or any other like system, plant or equipment, affected by and dedicated to the public use under privileges, franchises, licenses, or agreements granted by the State or by any political subdivision thereof. During the three years ending April 1, 1939, being those for which the inspection fees have been imposed in this case, the Gas Company had, jointly with the Memphis Power & Light Company, a contract with the City of Memphis to furnish natural gas to all citizens of that municipality. The details and effect of this contract are set out at length in reported decisions; Memphis Nat. Gas Co. *v.* Pope, 178 Tenn. 580; Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 86 L. Ed. 1090; and are here to be treated under the stipulation as part of Complainant's

proof. In the Pope case, supra, p. 585, it is found as a fact:

> ". . . that the bulk of all complainant's revenues from every source is derived from its business done with and through Memphis Power and Light Company."

During these same three years the Gas Company also had a contract to furnish natural gas to another retail distributing company, the West Tennessee Power & Light Company.

The Gas Company enjoyed privileges and franchises from the City of Memphis (Pope and Beeler cases, supra), from seven West Tennessee counties, and various franchises for rights-of-way over, through and upon State highways from the State Highway Department.

Pertinent provisions of the Gas Company's charter are:

> "The nature of the business of the company and the objects and purposes proposed to be transacted, promoted or carried on by it, are as follows:
>
> "(a) . . . and to carry on all of the businesses that are usual to or may be conveniently carried on *by gas companies or gas pipe line companies.*
>
> "At pages 1 and 2 of said charter, it is provided:
>
> "The nature of the business of the corporation and the objects or purposes to be transacted, promoted or carried on by it are as follows, to-wit: . . . (b) . . . to construct and maintain conduits and lines of tubing and pipe for the transportation of gas or oil *for the public generally* . . ." (Our emphasis.)

During the three years in question, the Company's commercial domicile was in Memphis, where it had offices and kept a crew of employees for operation and maintenance, and the Company was domesticated in the State of Tennessee, to do business here, though it was incorporated under the laws of the State of Delaware. For a disposition of the case on the facts before us, which are undisputed,

we find it unnecessary to determine whether powers granted to a corporation by the charter and not exercised, shall, nevertheless, render such corporation a public utility, or whether the character of the corporation shall be determined by the provisions of its charter, and not its exercise of power.

> "The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does." United States *v.* Brooklyn Eastern District Terminal, 249 U. S., 296, 304, 63 L. ed., 613, 616.

> "The term 'public use' is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet when they came the Courts, recognizing the important part they were to perform in supplying a public want, did not hesitate to take control of them as quasi-governmental agents and extend to them the right of eminent domain in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that 'anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities' (In re Stewart (Minn.), 35 L. R. A.), and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use. Mills on Em. Dom., Sec. 11." Ryan *v.* Terminal Co., 102 Tenn., 11, 118.

This exposition of the phrase "public use" by Chief Justice Beard, has been often quoted and followed in subsequent opinions of this Court. Power Co. *v.* Webb, 123 Tenn.,

584, 590; Railroad *v.* Transportation Co., 128 Tenn., 277, 286; State *v.* Union Ry. Co., 129 Tenn., 705, 724; Webb *v.* Knox Co. Transmission Co., 143 Tenn., 423, 434; State ex rel. *v. City of Memphis,* 147 Tenn., 658, 676; Ferrell *v.* Doak, 152 Tenn., 88, 90; Armstrong *v.* Ill. Cent. R. Co., 153 Tenn., 283, 295; Housing Authority, Inc. *v.* Knoxville, 174 Tenn., 76, 84.

These same authorities make it abundantly clear that in our decisions, the terms "public use" and "public utility" are synonyms. The statutory definition of Code section 5448 determines those public utilities over which the Railroad and Public Utilities Commission is given control and supervision. Here it is necessary for us to determine, in view of the assignment of error, whether the Memphis Natural Gas Company is a public utility, and second, whether it is such public utility as is within the jurisdiction and control of the Commission.

It is not disputed that the sale of natural gas to the ultimate consumer is such an operation as is affected by and dedicated to the public use, nor that in the present case, the Gas Company was operating under privileges and franchises from the City of Memphis, seven West Tennessee counties, and the State of Tennessee through its Highway Department, and that the scope of the power granted the corporation in its charter, gave the corporation a right to operate as a public utility. The Gas Company does contend, however, in its supplemental brief, that the franchises, etc., mentioned in Code section 5448 are limited to such as are evidenced by what are known as certificates of "convenience and necessity," but we think it is unnecessary for us to settle that issue, since by the unusual way in which this case is presented here for our decision, the question has already been decided for us by the United States Supreme Court in a suit to determine the liability of the Memphis Natural Gas Company for the Tennessee State Excise Tax:

> "Taxpayer's (Memphis Natural Gas Company) contribution to the joint undertaking with the Memphis (Power & Light) company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the

joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, *went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis Company.*" (Our emphasis.) Memphis Natural Gas Co. *v.* Beeler, (Stone, C. J.) 315 U. S., 649, 656, 86 L. ed., 1090, 1096.

We have seen that the charter of the Gas Company gave it power to do business as a public utility and we think this definition of the very operation we are here considering, conclusively determines that the Memphis Natural Gas Company was exercising the power in the three years ending March 31, 1939, and further, under the jurisdictional definition of Code section 5448, that it was such utility as was amenable to supervision and control of the State Public Utilities Commission. The same finding by this Court in the Pope case, supra, is merely cumulative. Findings of fact in both these cases are to be given weight here as the Gas Company's own proof.

By simple rules of logic, the decision in the Beeler case, supra, was rendered inevitable by earlier opinions of the United States Supreme Court. Southern Nat. Gas Corp. *v.* Alabama, 301 U. S., 148, 81 L. ed., 970; Missouri, ex rel. *v.* Kansas Natural Gas Co., 265 U. S., 298, 68 L. ed., 1027; Lone Star Gas Co. *v.* Texas, 304, U. S., 224, 82 L. ed., 1304. In the last case, the question was one of the control by the Texas Railroad Commission of a Natural Gas Company piping gas in interstate commerce to retail distributing companies which were affiliates of the Natural Gas Company owning and operating the interstate pipe line. Viewing the sale and distribution of gas under such circumstances as a continuous operation and subject to control by the State Commission, Chief Justice Hughes said, in delivering the opinion of the Court:

"Thus, the latter companies and appellant are but arms of the same organization doing an intrastate business in Texas and the Commission was entitled to

ascertain and determine what was a reasonable charge for the gas supplied through this organization to consumers within the State." Lone Star Gas Co. *v.* Texas, 304 U. S., 224, 237, 82 L. ed., 1304, 1313-1314.

The complete analogy with the case here needs no elaboration.

Since it is thus established that the Gas Company in the present case was, during the three years in question, engaged as a public utility in intrastate operation, there is no basis, whatever, for the argument that State control was precluded by the Federal Natural Gas Act of 1938 Federal Utility Regulation, Ann., Vol. 2, p. 639), since such argument has no reasonable basis unless the operation was exclusively interstate. If, for the legality of the levy of the State Excise Tax in the Beeler case, supra, this same operation by the Memphis Gas Company was one in intrastate commerce, as the U. S. Supreme Court in the Beeler case held it was, it is an intrastate operation here, since it is the same operation. The inspection fees here in question, were imposed for three years of that operation.

There have been changes and developments in the Company's method of business since that date, but those changes are not relevant to the inquiry here. The fact that the Company, since the imposition of the inspection fees, has made application and been put under control of the Federal Power Commission, can not affect our decision of this case, —on facts occurring before Federal control was effective. Furthermore, Federal control of the Natural Gas industry as it exists today, is not exclusive of State control but concurrent with it.

> "The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere." *Public Utilities Commission* v.

United Fuel Gas Co., 317 U. S. 456, 467, 87 L. ed., 396, 402.

The first three sub-sections of the assignment of error are overruled, and we hold that in its operation during the three years preceding April 1, 1939, the Gas Company was a public utility, subject to regulation and control by the Railroad and Public Utilities Commission, and subject to all statutes of Tennessee having to do with public utilities.

It is next asserted that the inspection fees are an illegal charge since there was, in fact, no inspection; that the amount of the fees was not based on the expense to the State of making such inspections and that in fine, the imposition of the inspection fees is, in reality, the levy of a gross receipts tax. Since these contentions appear in the brief of the Gas Company as further subsections of its single anomalous assignments of error, we discuss them together.

In the first place, we find no justification for limiting the fees imposed here to the idea of inspection merely. The language of Code sec. 5459 imposing them, is much broader and states the purpose of the charge of these fees to be "for the inspection, control, and supervision of the business, service and rates" of the public utility against which the charge is made.

After providing in succeeding sections for the rate and time of payment of the fees, sec. 5465 provides that the Railroad and Public Utilities Commission shall file with the State Comptroller, a statement showing the fees to be paid by each utility, and that it shall be the duty of the Comptroller to collect said fees and to keep them in a separate account to be known as the "Public Utility Account," and there segregated.

By sec. 5468, the purposes for which funds in the Public Utilities Account may be lawfully expended, are set out and defined. These purposes include the employment of experts, engineers, attorneys, accountants and inspectors, whose compensation shall be paid only from the Public Utilities Account. *Cumberland Tel. & Tel. Co.* v. *Railroad and P. U. Com'n.* 287 Fed., 406. The fair and only reasonable inference from this legislation is that the Legislature

intended, by the fees and fines paid into the Public Utilities Account, to create a fund out of which the cost of administering public utilities in Tennessee should be paid, and to provide that the cost of administering such public utilities should be wholly paid by the utilities themselves. There is nothing novel nor revolutionary in this legislative plan for the operation of a special administrative department of the State Government. The same scheme has been in effect for many years in several other departments, notably that of Insurance and of Banking, and it exists to greater or less degree in all departments where the purpose is the regulation of some sort of business or profession by a State Board or Commission. Provision for the independent support of the Board and payment of its operating expenses by the persons or companies affected by its administrative control, have been common legislative formulae in our State Government.

In view of the language of one of the stipulations by which the Gas Company agreed "that the Commissioner might collect the fee if it is decided that the complainant is liable for the fee," we have some doubt whether the Gas Company may go farther on this appeal than to secure a determination of liability for the fees under the operation of the Gas Company disclosed by the record. However, as there is a sharp controversy between counsel as to the proper construction of this language of the stipulation, we are unwilling to penalize the Gas Company by enforcing a limit on the scope of the appeal, which the Gas Company asserts that it did not intend to approve.

Returning, therefore, to a consideration of the propriety of the fees charged, we think the undisputed evidence of the Gas Company's witness Dearth makes it clear that the Commission did make some inspections of the operation and properties of the Gas Company, and since the facts disclosed by the Beeler and Pope cases, supra, make out a combined, continuing operation,—a joint enterprise of the Gas Company with the Memphis Power & Light Company,—we think it wholly reasonable that fees for "inspection, control and supervision" of the joint operation should be paid by both utilities for the purposes of the "Public Utility Account."

Moreover, the burden of showing both that the inspection was a fiction, and that the fees imposed therefor were excessive, was upon the Gas Company asserting these propositions. *McCanless* v. *S. E. Greyhound Lines,* 178 Tenn., 614, 629; *Clark* v. *Paul Gray,* 306 U. S., 583, 83 L. Ed., 1001. As stated, the only evidence on the point, is that of one of the Gas Company's witnesses who testified that inspections were made and there is no evidence, whatever, to support the argument that the fees charged were excessive. On neither point has the Gas Company carried the burden.

That natural gas, the commodity here involved, is, because of its explosive and asphyxiating potential, a dangerous instrumentality is too well known to be questioned. Being such, its transportation and distribution fall clearly and necessarily within the scope of the State police power for supervision and control in reasonable protection of the health and safety of the citizen, so that even if the operation of the Gas Company was exclusively interstate, which it was not in the three years preceding April 1, 1939, the State would not be precluded from inspection and control of the Gas Company's operation in the reasonable exercise of its police power. Thornton, Oil & Gas (Willis ed.) Vil. 3, sec. 795, p. 1099; *McCanless* v. *S. E. Greyhound Lines, supra; Kelly* v. *Washington,* 302 U. S., 1, 82 L. ed., 3. The constitutional validity of inspection, quarantine, health and other regulations, within the sphere of their acknowledged authority of a State is as clear as the power of Congress to establish regulations of commerce, notwithstanding that both operate upon the same subject. *Foster* v. *Master and Wardens* of the Port of New Orleans, 94 U. S., 246, 24 L. ed., 122.

> "The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people." *Clason* v. *Indiana,* 59 S. Ct., 609, 306 U. S., 439, 83 L. ed. 858. *Parker* v. *Brown,* 317 U. S., 341, 87 L. ed., 315.

There remains to consider the argument of the Gas Company,—that the inspection fees imposed were in reality a

gross receipts tax. As stated, these fees are authorized by sections 5459-5465 of the Code of Tennessee. It is true that the amount of the fees is to be "measured by the amount of the gross receipts of each public utility" (sec. 5461), but the fees are to be kept apart and deposited in a "Public Utility Account" (sec. 5465), and from this account only expenses of the administration and supervision of public utilities may be paid. Use of funds in the account is limited to this purpose, and payment of administrative expenses is limited by the amount of this special fund. *Cumberland Tel. & Tel. Co.* v. *Railroad and P. U. Com'n., supra.* Such a levy is a special assessment for a specific purpose and lacks essential elements of a tax (Cooley Taxation, Vol. 1, sec. 33, *et seq.*). Here the Legislature decided that gross receipts from business done in the State provided a convenient yardstick for measuring the fair contribution of the public utility to the administrative expense fund. For the same administrative purpose, fees are imposed on banks on the basis of capital investment (sec. 5948), and without further illustrations, though they might be multiplied, we find it true that in no law of this sort, is the amount of the fee fixed by the actual cost to the State, of regulation, control, or administration of the specific utility or company against which the fee is assessed, but that utilities are required to contribute to the "Public Utility Account" for the administration of all utilities, and banks to the banking department for the supervision of all banks. The limit is that the expense may not be paid if it is incurred, unless the funds in the specific departmental accounts are sufficient. Law dictionaries, textbooks and cases from other jurisdictions, make it clear that the essential test to determine whether such fees are, or are not taxes, is whether they are, or are paid into the general public treasury and disbursable for general public expenses. *Cooley Taxation, supra; State, ex rel.,* v. *Gorman, (Minn.)* 41 N. W., 948, 2 L. R. A., 701; *Hauser v. Miller (Mont.)* 94 Pac., 197.

> "A tax is a sum which is required to be paid by the citizen annually for revenue for public purposes." *Mayor and Aldermen* v. *Maberry, (Green, J.)* 25 Tenn., 275, 278.

Even if the purpose of the assessment was limited to the exercise of the police power, fees imposed to defray the expenses of that exercise are not objectionable. *State* v. *Bixman, (Mo.)* 62 S. W., 828.

To be properly defined as "taxes" the fees must be paid into the public treasury as a part of the General Revenue and be subject to disbursement for the "General Public Need." cf. "tax" and "taxation," Webster's International Dictionary, Black's Law Dictionary, Bouvier's Law Dictionary; *Mayor and Aldermen* v. *Maberry, supra.*

For the reasons stated, the assignment of error and its various subdivisions are overruled, and the decree of the Chancellor is affirmed at the cost of the Appellant.

(Signed) GAILOR, *J.*

(6269)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 424

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

GEORGE F. McCANLESS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, AND J. C. JOHNSON, CONSTABLE OF SHELBY COUNTY, TENNESSEE,
Appellees.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

REPLY OF APPELLANT TO THE MOTION TO DISMISS

The motion to dismiss insists that appeal is not the proper remedy and cites *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 357, in which the appeal was dismissed and certiorari granted.

> "It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so, we are without jurisdiction over the appeal."

The test of the question is stated therein:

> "Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the State Supreme Court to be an issue, we must dismiss the appeal for want of jurisdiction."

But in the appeal at bar the Supreme Court of Tennessee recognized that appellant launched its attack upon the validity of the statutes as applied.

> See Page 10 of the Statement as to Jurisdiction, the Assignments of Error in the Supreme Court of Tennessee and a part of the opinion specifically recognizing the appellant's attack upon the application of the statutes to appellant.

Plainly the constitutional questions were in issue in the Supreme Court of Tennessee. The motion to dismiss next delves deeply into the merits of the controversy. We do not understand this is the point in this appeal to go extensively into the merits of the controversy, and therefore make this reply rather brief and by no means exhaustive of the important questions involved.

The Supreme Court of Tennessee applied the statutes to appellant because it decided the pipe line corporation is a public utility distributing gas.

It is most difficult to understand how anyone can reach such a conclusion. It is undisputed and admitted that the Memphis Natural Gas Company does not own or operate any service pipes or distributing plant or facilities. *How then is it humanly possible for the appellant to be a public utility distributing gas in Tennessee when it has absolutely no facilities or means to distribute anything or render any service to the public?*

It is just as absurd to say that one is engaged in the railroad business though it has no railroad or railroad equipment.

There is no substantial basis for the state court decision. It is a colorable decision for the determined purpose of subjecting an important interstate property to local control and mulcting it annually to support the State Commission. The constitutional issues were ignored and resort had by the Supreme Court of Tennessee to tenuous arguments and erroneous factual assumptions to transform private property into a public utility in violation of simple and basic constitutional rights.

In such a situation the words of this court in *Memphis Natural Gas Co.* v. *Beeler* are apt:

> "We examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue."

We respectfully submit that this state decision violates the principle just quoted. If it is not corrected and clarified, there will rain upon this court in succeeding years a multitude of cases from state courts stemming from this decision which says that if a private corporation is entitled by contract to some of the profit made by a public utility, the recipient private corporation is thereby transformed and converted into a public utility of the same kind—though it has no physical means to distribute anything or to serve the public in any manner.

Such an artificial conclusion is no different from saying that if a landlord rents his property to a light, gas or water public utility on the basis of the rent being measured by a percentage of the profits, the landlord thereby becomes a public utility. The profit-sharing arrangement between Memphis Natural Gas Company, the pipe line corporation, and the Memphis Power & Light Company, the distributing utility, is no different in principle from the illustration stated. Pursuant to the contract the pipe line corporation

sold the gas to the distributing utility, and the price was measured in part by the profit made by the distributing utility. Such plainly is the effect of the contract, and as stated by this court in *Memphis Natural Gas Co.* v. *Beeler.*

The late Mr. Justice Cardozo, discussing a somewhat similar situation in *People ex rel. Pennsylvania Gas Co.* v. *Saxe, et al.*, 229 N. Y. 446, 128 N. E. 673, on page 674 stated in connection with a profit-sharing price formula:

> "We think the interstate character of the relator's business is untouched by these arrangements"
>
> and
>
> "the sale does not cease to be one in interstate commerce because the price is to be measured by the purchaser's receipts."

This language can properly be paragraphed: The sale by the pipe line, the private corporation, to the distributing company does not change the character of the private corporation and cause it to be transformed into a public utility "because the price is to be measured by the purchaser's receipts."

Is it not indeed a challenge and a serious thing to confiscate private property for public purposes upon the expedient that the price to be paid by a distributing company to a pipe line corporation for gas is measured in part by the distributing company's profits? Is it not disturbing and shocking that the Supreme Court of Tennessee has used this method of determining the price for gas as an excuse to require the pipe line corporation to pay $5,000.00 a year "to reimburse the State" for regulation and inspections which never took place and are the rankest of rank fiction? The motion to dismiss states that there were during the years involved inspections of the appellant's pipe line. This is altogether erroneous and there is no dispute

about the fact. The State took no proof. The appellant's proof is undisputed.

Mr. Johnson, the President of the pipe line corporation, testified on direct examination:

> "Q. 27. Has a representative of the Railroad and Public Utilities Commission or of the State of Tennessee prior to the filing of this suit inspected the properties of the Memphis Natural Gas Company in the State of Tennessee?
>
> A. Not to my knowledge."

On cross-examination he testified:

> "Q. 89. Did you know of Mr. Williams', chief engineer of this Commission, visit to your company last year, and did you know that he contacted some representative of your company?
>
> A. I don't believe I met Mr. Williams at the time, but I understood he was at the office in Memphis.
>
> Q. 90. And did you know that some representative of your company took him over your properties?
>
> A. Yes, but that was at a date after the filing of this suit."

The Chief Engineer of the State Commission visited for the first time the properties of the pipe line *after this suit was filed* because the complaint charged there had never been any attempted control, regulation, inspection or supervision of appellant's properties by the State or any of its agencies. Therefore the State had done nothing for which reimbursement could be claimed under the police power.

Mr. Dearth, Secretary-Treasurer of the pipeline corporation, testified on cross-examination:

> "Q. 95. Did you go out with Mr. Williams, the Chief Engineer of the Commission, at the time that he was down in Memphis going over the property of your company, or did you go out with any other engineer or representative of the Commission?

A. Another representative went with Mr. Williams over the properties. I talked with Mr. Williams in the office, but I did not make any trips with him over the lines or system."

The foregoing is all of the proof about inspections. It is beyond dispute that the visit by Mr. Williams, Chief Engineer, was after this suit was instituted.

The motion to dismiss states that this evidence means that Mr. Williams made his inspection prior to the institution of this suit and during the years involved in the controversy. On this point the Supreme Court of Tennessee stated:

"* * * we think the undisputed evidence of the Gas Company's witness Dearth makes it clear that the Commission did make some inspections of the operation and properties of the Gas Company" etc.

Yes, after the controversy developed and the suit was instituted and for the purpose of bolstering the State's position.

This point has been discussed by us to illustrate and show that the state decision is built upon erroneous assumptions of fact to justify the application of the State statutes to appellant. Their effect is to strip appellant of its constitutional rights.

The motion to dismiss states that the franchise from the City of Memphis to distribute gas was granted to the pipe line corporation, and the Supreme Court of Tennessee made a similar statement:

"* * * the Gas Company was operating under privileges and franchises from the City of Memphis" etc.

This is equally erroneous. This court stated in *Memphis Natural Gas Co.* v. *Beeler*:

"The contract (between pipe line corporation and distributing company) was entered into as a prelim-

> inary to the award by the City of Memphis to the Memphis Company (Memphis Power & Light) of its franchise to distribute gas to consumers, and the execution of the contract was a condition of the grant of the franchise." (Parenthetical insertions ours.)

In other words the distributing Company, Memphis Power & Light Company, could not get a franchise from the City of Memphis until it showed that it had a contract with a pipe line corporation to supply it with gas. After making such a contract with the pipe line corporation, the distributing company then filed it with the City of Memphis as a part of its application for a franchise to distribute gas in Memphis. These undisputed facts are said to mean that the City of Memphis granted to the Memphis Natural Gas Company, the pipe line corporation, the franchise to distribute gas in Memphis.

These adverse but material and unsupported findings of fact are the pegs on which the state decision hangs, and are the excuse to apply to appellant the State statutes in denial of its constitutional rights.

Are such results right and do they conform to constitutional guaranties? In our humble judgment, the answer should be no.

The fundamental, controlling and undisputed fact is that appellant has no distributing facilities and does not serve the public.

Memphis Natural Gas Co. v. *Beeler,* 315 U. S., p. 652 so states:

> "Taxpayer, a Delaware corporation, was engaged during the period in question in the business of purchasing natural gas in Louisiana and transporting it through its pipe line to points in Tennessee where it delivered the gas into the pipe lines of two distributing companies—Memphis Power & Light Company and West Tennessee Power & Light Company—which sold the gas to local consumers."

Memphis Natural Gas Co. v. *Pope*, 178 Tenn. 584.

> "The distributing lines and appliances for sale and distribution belong to Memphis Power & Light Company."

Memphis Natural Gas Co. v. *McCanless*, 180 Tenn., Page 691 states:

> "The distributing agencies pay the complainant for the gas taken by them at these various connections and the complainant has nothing to do with the distribution and sale of the gas by such agencies.
>
> "Upon these facts we do not think it can be said that the complainant is distributing natural gas or is a distributor of natural gas in Tennessee."

It should be borne in mind that each of the above three cases deals with facts existing in each of the years involved in this present appeal, and by stipulation these facts are a part of the appellant's proof.

In all three of the above decisions it was found that the appellant has no distributing facilities and does not serve the public. In the present appeal the Supreme Court of Tennessee goes counter to the facts decided not only by it, but also by this court. In the motion to dismiss it is stated that the last above quotation was made concerning years subsequent to those here involved. Again the appellees are in factual error. The suit involved the pipe line corporation's liability for a gross receipts tax for the privilege of distributing natural gas and imposed by Chapter 108 of the Public Acts of 1937. The Supreme Court of Tennessee stated on Page 693:

> "We do not think there is any liability on the part of the complainant for the gross receipts tax during the time in which gas was being distributed as a joint enterprise by complainant and Memphis Power & Light Company."

This necessarily deals with the period from 1937, the date of the passage of the Act, thoughout the time the profit-sharing contract between the pipe line corporation and the distributing company was in existence.

It was decided by this court in *Memphis Natural Gas Co.* v. *Beeler* that the pipe line corporation had to pay the Tennessee corporation excise tax because it had income from local Tennessee business—its part of the profit made by the distributing company. This court said on Page 653:

> "It follows that if the Supreme Court of Tennessee correctly construed taxpayer's contract with the Memphis (Power & Light) Company as establishing a profit-sharing joint adventure in the distribution of gas to Tennessee consumers, the taxpayer's *net earnings under the contract* were subject to local taxation."

The profit-sharing arrangement and the receipt by the pipe line corporation of its share of profits made by the distributing company caused this court to conclude that the pipe line corporation has to pay the corporation excise tax on the income so received from Tennessee intrastate business. This was the decisive point.

The State Supreme Court translates this in the present appeal to mean that the pipe line corporation is a public utility and that the Tennessee statutes are applicable to it. Obviously this is unsound and fantastic.

There are other important questions involved which we will not undertake to here discuss as we understand it is improper procedure to do so on this jurisdictional motion. Some of the other important Federal questions involved are the conflict of the Tennessee decision with the Federal Natural Gas Act of 1938, the plain invasion by the State of the Federal right to control and regulate interstate commerce, the confiscation of private property for public uses in violation of the Fourteenth Amendment

and other highly important and substantial Federal questions.

The basis of the Tennessee decision is unsubstantial and artificial. If a state court ignores material and undisputed facts and decides them in a manner inconsistent with the undisputed facts and thus strips the appellant of its constitutional rights, there is no other recourse than this very important right of appeal which appellant respectfully prays.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 424

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

GEORGE F. McCANLESS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, AND J. C. JOHNSON, CONSTABLE OF SHELBY COUNTY, TENNESSEE

APPEAL FROM THE SUPREME COURT OF TENNESSEE

MOTION TO DISMISS

ROY H. BEELER,
Attorney General;
W. F. BARRY, JR.,
Solicitor General;
ALLISON B. HUMPHREYS, JR.,
Advocate General,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 424

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Appellees.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

MOTION TO DISMISS

Now comes the appellees and move the Court to dismiss the appeal filed herein and for cause show:

Grounds of Motion to Dismiss

1

Because the appeal has been prayed for and granted as an appeal under Section 237(a) of the Judicial Code, as amended, 28 USCA 344(a), as though the suit in the Tennessee state courts had drawn in question the Federal con-

stitutional validity of a state statute and the decision had been in favor of the validity of the State statute, when, a petition for a writ of certiorari should have been resorted to under Section 237(b) of the Judicial Code, as amended, 28 USCA 344(b), the suit involving only the question, whether any title, right, privilege or immunity guaranteed the appellant by the Constitution of the United States, has been denied Memphis Natural Gas Company.

2

Because the decision of the Tennessee state courts determining and adjudicating appellant's liability for inspection fees did not deprive the appellant of any title, right, immunity, or privilege, to which it was entitled under the Constitution, treaties or laws of the United States.

3

Because the statutes in question were not applied contrary to the Constitution of the United States.

Discussion of Motion to Dismiss the Question Presented for Decision to the Tennessee State Courts

The question presented to the Tennessee state courts by the suit of appellant, Memphis Natural Gas Company, against George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee, and J. C. Johnson, Constable of Shelby County, Tennessee, was, whether the Memphis Natural Gas Company was liable to pay inspection fees to the State of Tennessee as a public utility for the three years of April 1, 1936 to March 31, 1939, under these statutes:

> "'*Public utilities' defined.*—The term 'public utility' is defined to include every individual, copartnership, association, corporation, or joint stock company,

their lessees, trustees or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements granted by the state or by any political subdivision thereof. * * *" (The remaining portion of this statute omitted because irrelevant)

Ch. 49, sec. 3, Pub. Acts of Tenn. (1919); Sec. 5448, Code of Tenn.

"*Provisions apply to what utilities.*—The provisions of this statute shall be construed to apply to and affect only public utilities which furnish products or services within the state, and this statute shall not be construed to extend to any public utility engaged in interstate commerce for the government or regulations of which jurisdiction is vested in the interstate commerce commission or other federal board or commission."

Ch. 49, sec. 10, Pub. Acts of Tenn. (1919); Sec. 5456, Code of Tenn.

"*Fee for inspection, control, etc., of utilities.*—Every public utility doing business in this state and subject to the control and jurisdiction of the railroad and public utilities commission to which the provisions of this statute apply, shall pay to the State of Tennessee on or before April 1st of each year, a fee for the inspection, control, and supervision of the business, service, and rates of such public utility."

Ch. 107, sec. 1, Pub. Acts of Tenn. (1921); Sec. 5459, Code of Tenn.

"*Fee measured by gross receipts; rates fixed.*—The amount of such fee is to be measured by the amount of the gross receipts of each public utility in excess

of five thousand dollars. The fee fixed and assessed against and to be paid by each public utility is as follows: $3.00 per $1,000.00 for the first $1,000,000.00 or less of such gross receipts over $5,000.00; 75 cents per $1,000.00 for each additional $1,000.00 of such gross receipts over and above $1,000,000.00."

Ch. 107, sec. 1, Pub. Acts of Tenn. (1921); Sec. 5461, Code of Tenn.

The appellant contended in the state courts that it was not a public utility as defined in these Tennessee state statutes. It did not contend that these statutes defining a public utility were unconstitutional.

This primary contention was supported by a number of allied contentions all stemming from the primary contention and partaking of the same nature as it, to the effect: (a) The Memphis Natural Gas Company was not subject to the control and jurisdiction of the Railroad and Public Utilities Commission under the language of the statute; (b) that it was not the kind of corporation to which the provisions of the statute applied; (c) that there had been no inspection, control and supervision of the business, service and rates of the Memphis Natural Gas Company to warrant the imposition of the inspection fees in question; (e) that the statutes in question did not warrant the imposition of inspection, control and supervision fees upon such a business as the Memphis Natural Gas Company; (f) that in any event it would only be liable to pay inspection fees in an amount sufficient actually to reimburse the State of Tennessee for expenses incurred in the lawful inspection of its properties and activities in Tennessee.

Corollary to this primary contention, it was insisted in the Supreme Court of Tennessee for the first time, that the action of the Railroad and Public Utilities Commission of Tennessee in assessing inspection fees against it as a

public utility, when in point of fact it was not, deprived it of property without due process of law, and thus violated Amendment 14 of the Constitution of the United States; and, amounted to the imposition of such a heavy annual burden upon the interstate transportation of natural gas into Tennessee by the Memphis Natural Gas Company as to constitute a direct burden upon interstate commerce and thus to violate Article 1, Section 8 of the Constitution of the United States wherein power to regulate commerce among the several states is delegated to the Congress.

These contentions of the Memphis Natural Gas Company were countered by the appellees and the Tennessee state courts were presented with the primary question, whether the Memphis Natural Gas Company was a public utility according to the definition of the Tennessee statute and liable thereunder for inspection fees.

The question whether the Tennessee statute defining public utilities was unconstitutional from the federal standpoint, was not presented to the Tennessee state courts. The Memphis Natural Gas Company never insisted that the statute in and of itself was unconstitutional but, only, that the exaction of the inspection fees of it was unlawful and deprived it of a federal constitutional immunity. Nowhere in the original bill filed in the chancery court of Davidson County, Tennessee, nor in the assignments of error in the Supreme Court of Tennessee, was any direct attack made upon the constitutionality of the statutes in question. The case turned on the question of fact whether the appellant operated a gas company in Tennessee, dedicated to the public use, which furnished products and services in Tennessee. The Tennessee state courts found from the evidence that the appellant did operate such a gas business in Tennessee, furnishing prod-

ucts and services in Tennessee and thus was liable for the inspection fees collected.

Examination of the record will reveal that the present case is not one where the facts being ascertained, the state courts erroneously applied the statute (such as *Fiske* v. *Kansas,* 274 U. S. 381), giving to the statute an unconstitutional meaning. But, is a case, where the statute being plain and valid and no attack being launched against it, the courts were presented with the inquiry whether the facts brought the Memphis Natural Gas Company under the statute.

It is plain from the record that the Tennessee state courts never entertained the idea of applying the statutes in question to an interstate carrier of gas or to one bringing gas into Tennessee in interstate commerce for sale at wholesale, but only considered the question whether, in the light of the facts, the Memphis Natural Gas Company was engaging in the gas business in Tennessee by furnishing products and services in Tennessee, and thus, liable for the inspection fee.

It should be borne in mind in passing upon this phase of this appeal that the act of the Railroad and Public Utilities Commission of Tennessee in assessing the Memphis Natural Gas Company with the inspection fees was not final, the Memphis Natural Gas Company having the right by statute to sue in a state court to recover the same. (Section 1790, et seq., Code of Tennessee).

Accordingly, appellees' ground No. 1 of this motion to dismiss should be sustained and the appeal treated as a petition for a writ of certiorari, pursuant to the provisions of Section 237(c) of the Judicial Code, as amended, 28 U. S. C. A. 344(c).

Memphis Natural Gas Co. v. *Beeler,* 315 U. S. 649.
Wilson v. *Cook,* L. Ed. Adv. Opn. Vol. 90, No, No. 10, at p. 609 (Decided March 4, 1946).

Discussion of Grounds Nos. 2 and 3 of Motion to Dismiss

It is respectfully submitted, it being determined the appeal prayed and granted the appellant must be deemed and treated as a petition for the writ of certiorari, the only question before this Honorable Supreme Court is whether the appellant has been denied constitutional immunity to which it was entitled. The determination of this question necessarily involves an examination of the facts. And, at the outset of this presentation of the facts the Court's attention is directed to a stipulation appearing at page 212 of the transcript:

"STIPULATION

I

"When the complaint took its depositions herein on May 20, 1940, it was stipulated:

"'Mr. Russell: It is stipulated between counsel that the proof taken on behalf of the complainant in the suit of the Memphis Natural Gas Company against Lewis S. Pope, number 23, 369 R. D., Chancery Court of Davidson County, Tennessee, Part I, may be introduced in this suit as a part of the complainant's proof; subject, however to the right of the defendants in this suit to object to any and all parts of the same for irrelevancy, incompetency or for other causes.'

"Since then, the suit of *Memphis Natural Gas Company* v. *Pope et. al*, referred to in the above described stipulation has been decided by the Supreme Court of Tennessee, and will be found in 178 Tenn., 580. The opinion therein and the other opinions referred to hereinafter in this stipulation set forth the nature of the complainant's organization and its business activities.

"As the proof in *Memphis Natural Gas Company* v. *Pope et al.*, is voluminous, it is now stipulated that

the same shall be eliminated as a part of the proof herein, and in lieu thereof all of the facts appearing in the following decisions shall be considered a part of the complainant's proof in this cause as fully as if introduced and copied, by stipulation, into the complainant's proof in this cause.

"This stipulation is made in the interest of brevity to avoid unnecessary work and reading for the Court, as well as for all concerned.

"The opinions are as follows:

"1. Memphis Natural Gas Co. *v.* Pope, 178 Tenn. 580 and the Court's opinion on the rehearing petition.

"2. Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649.

"3. Memphis Natural Gas Co. *v.* McCanless, 180 Tenn. 688.

"4. Memphis Natural Gas Co. *v.* McCanless, 180 Tenn. 695.

II

"It is further stipulated that the Memphis Power and Light Company paid its fees for inspection, control, etc., of utilities required by Williams Tennessee Code, section 5459, during the years involved in this suit.

III

"It is further stipulated that the complainant has for the last several years been ready to try this suit, and has caused the same to be set for hearing on several occasions, but the suit has been continued from time to time at the request of the different counsel who have from time to time represented the defendant. These requests for continuances have been due to the different counsel for the defendant joining the armed services and other causes beyond the control of defendant's counsel.

"This the 30th day of April, 1945.
Edward P. Russell, Counsel for complainant.
Thos. H. Peebles, Jr., Counsel for Defendant."

Both the Chancery Court and the Supreme Court of Tennessee found the facts stipulated that the Memphis Natural Gas Company was operating as a gas company in Tennessee, furnishing products and services in Tennessee.

In its written opinion, copied into the transcript of the record at pages 236; 239 the Supreme Court of Tennessee found:

"During the three years ending April 1, 1939, being those for which the inspection fees have been imposed in this case, the Gas Company had, jointly with the Memphis Power & Light Company, a contract with the City of Memphis to furnish natural gas to all citizens of the municipality. The details and effect of this contract are set out at length in reported decisions; Memphis Natural Gas Company *v.* Pope, 178 Tenn., 580; Memphis Natural Gas Company *v.* Beeler, 315 U. S. 649, 86 L. ed., 1090; and are here to be treated under the stipulation as part of complainant's proof."

"It is not disputed that the sale of natural gas to the ultimate consumer is such an operation as is affected by and dedicated to the public use, nor that in the present case, the Gas Company was operating under privileges and franchises from the City of Memphis, seven West Tennessee counties, and the State of Tennessee through its Highway Department, and that the scope of the powers granted the corporation in its charter, gave the corporation a right to operate as a public utility. The Gas Company does contend, however, in its supplemental brief, that the franchises, etc., mentioned in Code section 5448 are limited to such as are evidenced by what are known as certificates of 'convenience and necessity,' but we think it is unnecessary for us to settle that issue, since by the unusual way in which this case is presented here for our decision, the question has already been decided for us

by the United States Supreme Court in a suit to determine the liability of the Memphis Natural Gas Company for the Tennessee State Excise Tax:

"'Taxpayer's (Memphis Natural Gas Company) contribution to the joint undertaking with the Memphis (Power & Light) company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, *went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis Company.*' (Our emphasis)

Memphis Natural Gas Co. v. *Beeler* (Stone, C. J.), 315 U. S. 649, 656, 86 L. Ed., 1090, 1096.

"We have seen that the charter of the Gas Company gave its power to do business as a public utility and we think this definition of the very operation we are here considering, conclusively determines that the Memphis Natural Gas Company was exercising the power in the three years ending March 31, 1939, and further, under the jurisdictional definition of Code section 5448, that it was such utility as was amenable to supervision and control of the State Public Utilities Commission. The same finding by this Court in the Pope case, supra, is merely cumulative. Findings of fact in both these cases are to be given weight here as the Gas Company's own proof."

As briefly as possible, the facts found by the three opinions referred to in the stipulation copied above are as follows:

The appellant is a Delaware corporation domesticated in Tennessee, with its chief place of business in Memphis, Tennessee. It was promoted and organized in 1928. The

Memphis Power and Light Company was organized in the same year. During the years in question these two corporations were associated together by contract in furnishing natural gas brought from the gas fields at Monroe, Louisiana, into the State of Tennessee. The appellant had a contract with Memphis Power and Light Co. during all of the period of time under consideration to distribute the gas imported to consumers in Shelby County, Tennessee; also a contract with West Tennessee Power and Light Company which distributed the gas to other places in West Tennessee. It operated compressor stations along the transportation line which was 370.5 miles in length to force the flow of gas. It furnished one buyer in Arkansas, the Arkansas Power and Light Company, and two buyers in Tennessee, West Tennessee Power and Light Company and City of Memphis, which used the gas to generate electricity, in addition to those it served in conjunction with the Memphis Power and Light Company. It sold the major portion of the gas imported into Tennessee at retail in the city of Memphis. The appellant and Memphis Power and Light Company were promoted and organized for the purpose of bringing natural gas into Memphis and distributing it to the consuming public. For this purpose and coincidentally a franchise was obtained from the City of Memphis. This franchise ran in the name of the Memphis Power and Light Company. However, at the same time a contract, a copy of which appears in the transcript at pages 30-61, was executed by and between Memphis Natural Gas Company and Memphis Power and Light Company, and this contract was filed with the city as a part of the contract with the city by which the twenty-five year franchise was granted. The contract between the two gas companies is called a contract of bargain and sale. Memphis Natural Gas Company is called "seller" and Memphis Power and Light Company

is called "buyer." The contract is complicated and long. In this contract which was executed between Memphis Natural Gas Company and Memphis Power and Light Company, and presented to the city of Memphis to induce the city to grant the franchise, certain matters were stipulated between the parties. (These stipulations are summarized on page 587 of 178 Tennessee Report where they appear in the decision of *Memphis Natural Gas Company* v. *Pope*.) By this contract it is provided that not only is the "seller," Memphis Natural Gas Company, to participate in the profits of the distribution of gas in Shelby County by the Memphis Power and Light Company, but after a certain situation is reached the "seller" would receive all of the remaining profits of the distribution. In substance, with respect to the division of profits realized by the two corporations from the sale of natural gas at retail in Memphis, the contract provides that after deficits created in the organization of the Memphis Power and Light Company have been paid and the operation of the two corporations under the contract shall result in a profit, then an amount equal to one and one-half (1½%) per cent of the capital investment of the Memphis Power and Light Company shall be paid to it and all of the balance of the net proceeds shall go to the Memphis Natural Gas Company. The contract did not fix a price at which the gas was to be sold by Memphis Natural Gas Company to Memphis Power and Light Company, but there was an operation in which both companies were jointly interested. There was an allotment of work performed but a division of the entire results of that work. *These Gas Companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and the whole business was so intertwined as to make their business joint.*

(All of the foregoing extracted from *Memphis Natural Gas Company* v. *Pope,* 178 Tenn., page 580.)

In referring to the activities of these two corporations the Supreme Court of Tennessee said:

> "It is considerably like two partners, one to buy and haul in, another to sell, with two bank accounts and two sets of books, and at the end of each year a division of profits. The buying partner turns in the goods at certain prices, but these prices are just figures. In the end there is a division. *They are both merchants in the* same enterprise." (p. 595) (Emphasis supplied)

In this same opinion the Court further said:

> "Affiliated companies cannot be more effectually united than those bound together by bonds of joint adventure." (p. 596) (Emphasis supplied)

In the dissenting opinion filed by Justice Chambliss in *Memphis Natural Gas Company* v. *Pope, supra* (178 Tenn. p. 580), the effect of the opinion is summarized as follows:

> "As I understand the holding of liability is rested on the theory and finding that the interstate seller and shipper and the intrastate buyer and distributors are copartners, jointly interested in the business of gas distribution to consumers locally, * * *."

Concerning the effect of the contract between Memphis Natural Gas Company and Memphis Power and Light Company the Supreme Court of the United States in the case of *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 86 L. ed. 1091, had the following to say:

> "The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis company of its franchise to distribute gas to consumers, and execution of the contract was a condition of

the grant of the franchise. By the contract the Memphis company undertook to establish its distribution system. Taxpayer undertook to construct its pipeline with facilities, including measuring stations at a delivery point, for supplying the Memphis company with a varying flow of gas into the service pipes as and when required by the Memphis company for consumer needs. The amount so furnished, less certain deductions covered by a separate contract not now material, was to be divided into five classes, according to the use made of the gas by consumers, and was to be billed by taxpayer to the Memphis company at five different specified rates. The amount of gas allocated to each class was to be in proportion to the amount of that class of gas sold by the Memphis company for like use during the preceding month.

"At the end of each year the combined net surplus or deficit of the two companies was to be divided between them by a cash settlement. The surplus or deficit of each was to be arrived at by deducting from its gross revenues the operating costs, costs of property restorations and replacements, taxes, amortization of investment, and 6% upon investment, After all net deficits of both parties had been made up and the Memphis company had received from the combined net surpluses 1½% of its total investment annually, any additional combined net income was to be paid to or retained by taxpayer.

"The contract provided for readjustment from time to time of the billing price of the gas supplied by taxpayer so as to admit of reduction in the rates to consumers, after first allowing 'a reasonable return' on taxpayer's investment. The contract contains the usual provisions for inspection of books by the parties and the city, and a clause requiring all notices to be given to taxpayer at its Memphis office.

"The Supreme Court of Tennessee held that the city was a party to the contract entitled to the benefits of its provisisons for rate reductions. It held that the circumstance that taxpayer and the Memphis com-

pany were designated by the contract as 'seller' and 'buyer' did not alter or obscure the fact that taxpayer was a participant in the profits derived from the joint undertaking and that the precise time when the title to the gas passed, if it passed before distribution to consumers, was immaterial. In any case it thought that the tentative amounts to be paid by the Memphis company for the gas in the first instance were to be determined after delivery by the use made of it by consumers.

"We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the service and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer did not do such a business in the state as to be taxable there, or that the profits derived from it are not an appropriate measure of the tax.

"Taxpayer's contribution to the joint undertaking with the Memphis company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis company." (pp. 1095-1096)

It appears from the testimony of appellant's witness Burger L. Johnson, who was the President of appellant's corporation at the time his deposition was taken in this cause on May 20, 1940, that during the years in question the status of the appellant was not in any wise different

from what it was found to be in the opinions, the conclusions in which, are made a part of the evidence in this cause by stipulation. This witness testified that on June 27, 1939 the Memphis properties of the Memphis Power and Light Company were sold to the city of Memphis and that at about the same time the properties of the West Tennessee Power and Light Company were taken over by West Tennessee Gas Company and that a new contract was negotiated between Memphis Natural Gas Company and the city of Memphis, while the old contract theretofore existing between appellant and West Tennessee Power and Light Company had been assumed by the successor company. (The fact of the sale of the Memphis Power and Light Company to the city of Memphis on June 27, 1939 is of no importance in this cause, even though referred to in the original bill and the answer and in the proof because the assessment which was made in September of 1939 against appellant which resulted in the payment of the fees in question under protest in that same month was for a three year period ending March 31, 1939. The statute requiring the payment of the fees in question, Section 5459 of Williams Code of Tennessee Annotated, requires that such public utility "shall pay to the State of Tennessee on or before April first of each year, a fee for the inspection, * * *.")

It does appear that while the status of the appellant and its relationship to the Memphis Power and Light Company and the West Tennessee Power and Light Company had not changed any during this period, that the Natural Gas Act had been enacted and commencing in November of 1938 the appellant had undertaken to place itself under the jurisdiction of the Federal Power Commission by making reports to that body.

It appears from the evidence in the case that the appellant had consistently resisted the efforts of the Railroad and

Public Utilities Commission to assume jurisdiction over its activities in Tennessee.

Upon request the witness Dearth filed as an exhibit to his cross-examination, Exhibit A, photostatic copies of letters and documents granting appellant rights of way over and along State and county highways.

From the foregoing facts, all of which are to be deemed and treated as appellant's own proof under the terms of the stipulation, it seems quite plain that the Supreme Court of Tennessee correctly decided that the appellant, Memphis Natural Gas Company, was engaging in the gas business in Tennessee and furnishing products and services in Tennessee.

It is submitted that if it be accepted as an established fact that the appellant Memphis Natural Gas Company was operating a gas business in Tennessee by furnishing gas to the inhabitants of Memphis, Tennessee, under a joint enterprise contract with another gas company, during the years in question, it was liable to inspection by the Railroad and Public Utilities Commission of Tennessee and thus liable to pay the inspection fees assessed against it. The mere fact that the appellant purchased the gas thus distributed in a foreign state and brought it into Tennessee in interstate commerce would not deprive Tennessee of the right, through its Commission, to inspect and police the distribution of this gas to the ultimate consumers, the inhabitants of Memphis, Tennessee. A case directly in point is that of *Pennsylvania Gas Company* v. *Public Service Commission,* 252 U. S. 23, 64 L. Ed. 434. The facts of this case, briefly, were, the Pennsylvania Gas Company transported gas directly from the source of supply in the State of Pennsylvania to the consumers in the cities and towns of the State of New York without the intervention of any independent distributor. In deciding that the State of New York had the power from

the State Commission to regulate the price at which this gas should be sold to local consumers the Supreme Court of the United States said:

> "The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.
>
> "This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.
>
> "It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution.
>
> "The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that until the subject-matter is

regulated by congressional action, the exercise of authority conferred by the state upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution."

Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434.

Yet another important decision is *Western Distributing Company* v. *Public Service Commission of Kansas, et al.* The facts and holding in which are, briefly:

The State of Kansas undertook to fix the rates to be charged by Western Distributing Company, an interstate distributor, in the light of the rates charged that company by the Cities Service Gas Company, the interstate pipe line operator. This action was resisted on the ground that the State Commission could not investigate the reasonableness of the charge for natural gas made by Cities Service Gas Company to Western Distributing Company, this being interstate commerce. It appeared in the proof that the two companies were affiliated. The Court said:

"Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose

powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

• • • • • • •

"*Fourth.* The argument is made that the proofs demanded by the Commission will involve an extensive and unnecessary valuation of the pipe line company's property and an analysis of its business, and that this burden should not be thrown upon appellant. Whether this is so we need not now decide. It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case o parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.

"The judgment of the court below was right and it is affirmed."

Western Distributing Co. v. *Public Service Commission*, 285 U. S. 125-127, 76 L. Ed. 658-659.

It is averred in appellant's statement as to jurisdiction that the Tennessee statutes in question require the payment of fees for the maintenance of the State Commission measured by the gross receipts of the public utility whether derived from sources in Tennessee or outside Tennessee.

An examination of the statutes concerned will reveal that such is not the case. Section 5456 of the Code of Tennessee, being Section 10 of Chapter 49 of Public Acts of Tennessee for the year 1919, heretofore copies in this brief on page 3, provides that the statute shall apply to and affect only public utilities which furnish products or services within the state. Section 5459 of the Code of Tennessee, being Section 1 of Chapter 107 of the Public Acts of Tennessee for the year 1921, provides that the inspection fee shall be paid by every public utility doing business in Tennessee and subject to the jurisdiction of the Commission under the provisions of the Railroad and Public Utilities statutes. Section 5461 of the Code of Tennessee, being Sec. 1 of Chapter 107 of the Public Acts of Tennessee for the year 1921, provides that the amount of such fee is to be measured by the amount of the gross receipts of each public utility in excess of $5,000.00.

It is plain from a reading of the statutes involved that the amount of the fee is to be measured by the amount of the gross receipts of the public utility for products and services sold and distributed in Tennessee. The record in this case reveals that the inspection fees exacted of the appellant were measured by the amount of gross receipts of the appellant from its gas business in Tennessee. The Honorable Court's attention is directed to the following which appears in the opinion of the chancellor:

> "The complainant makes no issue about the amounts collected and admits that the amounts are correct if the complainant is liable for these control and supervision fees. Likewise there is no issue about the amount involved and the fact that this suit was instituted within thirty days subsequent to the payment under protest." (R. 216).

This finding of the chancellor was not challenged by the Memphis Natural Gas Company upon its appeal to the

Supreme Court of Tennessee by any assignments of error or otherwise.

In addition to the foregoing it appears from the answer of appellees filed in the chancery court that the Railroad and Public Utilities Commission assessed the appellant for inspection fees on the basis of its own return, made to the Railroad and Public Utilities Commission, of its gross revenue, which return it was required to make for purposes of *ad valorem* taxation (R. 26-28).

In addition to this it appears that the Railroad and Public Utilities Commission of Tennessee had attempted, unsuccessfully, to have the Memphis Natural Gas Company make a return to it of its gross receipts in Tennessee in order that the inspection fee might be assessed on the basis of the Gas Company's own return but the Gas Company refused to do this, so, the Railroad and Public Utilities Commission was compelled to make the assessment from the information before it on the Gas Company's own return for ad valorem taxation purposes. (See answer to O. B., Tr. pp. 26-28.)

Finally, it does not appear from the record that the inspection fees in question were fixed in consideration of any revenue earned or received by the Memphis Natural Gas Company outside of Tennessee.

It is averred in the statement as to jurisdiction that the appellant, Memphis Natural Gas Company, is a private corporation, in no sense dedicated to the public use and does not profess to serve the public, and does not possess by charter or otherwise the customary rights of eminent domain or other similar rights enjoyed by public utilities.

It is respectfully submitted that an examination of the part of the appellant's charter appearing in the transcript will not sustain this statement. Among other powers granted to the Gas Company by its charter are these:

"To manufacture, produce, acquire, store, use, supply, transport, distribute, buy and/or sell gas * * * for heat, light, power, and other purposes, * * *; and to carry on all the businesses that are usual to or may be conveniently carried on by gas companies or gas pipe line companies;

"(b) To acquire, construct, erect, lay down, maintain, enlarge, alter, work and use all such lands, buildings, easements, gas, and other works, machinery, plants, pipes, pipe lines, mains, holders, ovens, retorts, purifiers, compressors, meters, apparatus, appliances, material and things, and to supply all such materials, products and things as may be necessary, incident or convenient in connection with the production, use, storage, regulation, measurement, transportation, supply and distribution of any of the products of the company;" (Tr. pp. 133-134).

In addition to the foregoing, the charter of appellant provides that it shall have all of the general powers conferred on it by the laws of the State of Delaware.

In addition to these powers conferred upon the appellant by charter it had the power of eminent domain, as provided by Section 3167 of the Code of Tennessee, in part:

"Every corporation organized under the laws of any state of the United States and authorized to construct, own, and operate gas or electric plants or both for the purpose of furnishing gas or electricity or both to persons in this state or in this state and elsewhere, * * * and, for any or all of said purposes, authorized to construct and maintain pipe lines, is empowered to condemn and take upon paying or securing payment thereof, to purchase or otherwise acquire, such lands and interests in and by whomsoever owned as may be necessary or advisable in the construction, maintenance, and operation of either its gas or electric plants or both, * * *."

(1925, ch. 56, sec 1; Section 3167 Code of Tennessee.)

From the foregoing quotation from appellant's character and citation of the statute law in Tennessee it appears that the appellant did possess by charter and by statute the customary rights of eminent domain and other similar rights enjoyed by public utilities.

The averment is made in the statement as to jurisdiction that the undisputed facts show the appellant had only two customers in Tennessee in the years involved.

To the contrary, the undisputed facts show that the appellant, together with the Memphis Power and Light Company, had thousands of customers in Tennessee to whom they jointly sold gas. With regard to this we quote from the opinion of the Supreme Court of the United States a conclusion of fact and law, which under the stipulation heretofore referred to must be treated as a part of the appellant's proof:

> "Taxpayer's (Memphis Natural Gas Company) contribution to the joint undertaking with the Memphis (Power & Light) company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, *went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis Company.*" (Our Emphasis.)
>
> *Memphis Natural Gas Co.* v. *Beeler* (Stone, C. J.), 315 U. S. 649, 656, 86 L. Ed. 1090, 1096.

Most assuredly, the appellant will not be heard to say, as it undertakes now to do in its statement as to jurisdiction, that it was nothing but a private corporation with only two customers in Tennessee, when its own evidence

establishes the fact that during all of the three-year period in controversy its contract with the Memphis Power and Light Company, and its discharge of that contract, "constituted participation in the business of distributing gas to consumers after its delivery into the service pipes of the Memphis Company." (Who must have numbered in the thousands.) See *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 656, 86 L. Ed. 1090, 1096.

It is averred in appellant's statement as to jurisdiction that the trial court and the Supreme Court of Tennessee were in error in construing the stipulated decisions as supporting the conclusion that appellant is a public utility.

It is respectfully submitted that it would be impossible to draw any other conclusion from the stipulated cases. Not only is the appellant referred to in *Memphis Natural Gas Company* v. *Pope, supra,* as a public utility, being expressly so denominated in statements appearing on pages 591 and 595 of Vol. 178 Tenn., the effect of the conclusions of law and fact found and stated in the stipulated opinions is that the appellant, during the years in question, was engaged in the business of distributing natural gas at retail to customers in Tennessee, which of necessity constituted it a public utility both at the common law and under the Tennessee statute definitions. (See Stipulated Opinions.)

An effort is made in the statement as to jurisdiction to present the contract between the Memphis Natural Gas Company and the Memphis Power and Light Company as nothing more than a "profit sharing contract." It is respectfully submitted that these allegations in the statement as to jurisdiction completely omit from consideration and ignore the conclusions of fact found in *Memphis Natural Gas Company* v. *Beeler, supra,* and in *Memphis Natural Gas Company* v. *Pope, supra,* in which case the court said of the

relationship between the Memphis Natural Gas Company and the Memphis Power and Light Company:

> "There seems to be separate corporate entity, as was found by the Chancellor. This does not preclude a conclusion that these gas companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and that the whole business is so intertwined as to make their business joint. The business done in Tennessee by complainant with the West Tennessee Power and Light Company amounted to approximately one or two percent during the years in question."
>
> *Memphis Natural Gas Co.* v. *Pope,* 178 Tenn. 580, 593.

The foregoing statement must be given effect and considered as the appellant's own proof under the stipulation.

The holding of the Supreme Court of Tennessee is challenged in the statement as to jurisdiction on the ground that the record shows that there was not any inspection, control or supervision of regulations of any of appellant's Tennessee properties during the years in question. The finding of the Supreme Court of Tennessee in this regard, which was to the effect that there had been such an inspection, is attacked on the ground that the record does not sustain such a finding.

The appellant introduced a witness, A. C. Dearth, Assistant Secretary and Treasurer of the Company. During the course of this witness' testimony he was asked and answered the following question:

> "Q. 95. Did you go out with Mr. Williams, the Chief Engineer of the Commission, at the time that he was down in Memphis going over the property of your company, or did you go out with any other engineer or representative of the Commission?
>
> "A. Another representative went with Mr. Williams over the properties, I talked with Mr. Williams in the

office, but I did not make any trips with him over the lines or system'' (Tr. p. 165).

From this it appears that the Supreme Court of Tennessee's conclusion in this regard is sustained by the record.

However, it is respectfully submitted, that if it be accepted as established that the Memphis Natural Gas Company was engaged together with the Memphis Power and Light Company in the retail distribution of natural gas to retail consumers in Memphis, Tennessee, it is immaterial whether there was any actual inspection, control, supervision or regulation exercised by the Railroad and Public Utilities Commission. We say this for the reason the statutes establishing the Railroad and Public Utilities Commission and providing for the inspection, control, supervision and regulation of public utilities contemplate the maintenance of facilities to inspect, control, supervise and regulate a public utility whenever the interest of the public requires the exercise of this jurisdiction. If it so happened that the rates charged by the Memphis Natural Gas Company and the Memphis Power and Light Company were reasonable and no regulation thereof was required, or the manner of the maintenance of its system necessitated no inspection, this would not relieve the appellant of its liability for the inspection fees, which by statute are deposited in a separate fund and not intermingled with the general revenue of the State and are to be used only for the purpose of maintaining the Commission so that it would be available should inspection become necessary, because the Commission and its staff must be maintained, and should be maintained, at the cost of those utilities which justify and necessitate its existence until the occasion occurs for such Commission to exercise its jurisdiction. A commission and a staff of experts capable of exercising the jurisdiction and discharging the duties contemplated of it by the Tennessee statute could not be

assembled upon each occasion it might become necessary to exercise the power of inspection and regulation. Those public utilities which the Commission is created to regulate and inspect must maintain the Commission until there is occasion for inspection and regulation. The public utility cannot complain of this since the cost of maintaining the Commission is paid for, after all, by the consumer of its products and service.

The insistence of the appellant that there was no actual inspection of its properties in Tennessee would only be material and of interest in the event it were to be decided that the appellant was engaged solely in interstate commerce. If such conclusion were to be reached then the question whether there had ever been any inspection would be subject to examination because, of course, the State of Tennessee would be limited to collecting inspection fees on the basis of the actual cost of inspection. However, even if this conclusion were to be reached, the appellant's objection to the State court's opinion on this account could not be sustained because the appellant has utterly failed to show that the inspection fees imposed are excessive for the purpose declared in the statute. One who attacks the validity of a statute imposing an inspection fee has the burden of proof to show that the fees are excessive for the purpose declared in the statute. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 83 L. Ed. 1001.

Repeatedly the insistence is made by the appellant that the Tennessee courts were in error in holding it to be a public utility because the original charter granted to it was amended a few weeks after it was granted so as to eliminate the provision therein empowering the Gas Company to transport gas for the public generally as well as for the use of the corporation.

In reply to this we would like to point out it has never been the insistence of the appellees that the appellant is

a pipe line common carrier. It is immaterial to the consideration and decision of the issues of this appeal whether the charter of the appellant be construed as granting it power to carry natural gas for the public at large or only for itself. The basis of the opinion of the Tennessee courts was that the appellant was engaging in business in Tennessee as a gas company. We take it to be so universally accepted that a gas company is a public utility, that we will not cite authority in support of this proposition.

In the statement as to jurisdiction it is urged that the opinion of the State courts sustaining the right of the Commission to regulate the appellant's business ignores the Federal Natural Gas Act and brings the regulation by the State of Tennessee into conflict with the Federal regulation of the same activities. It is respectfully submitted that the Tennessee State courts committed no reversible error in holding that the Federal Natural Gas Act did not operate to deprive it of jurisdiction to regulate the intrastate activities of the appellant, in engaging in the sale of natural gas to retail consumers in Memphis. With regard to this proposition the Supreme Court of Tennessee said:

> "Since it is thus established that the Gas Company in the present case was, during the three years in question, engaged as a public utility in intrastate operation, there is no basis, whatever, for the argument that State control was precluded by the Federal Natural Gas Act of 1938 (Federal Utility Regulation, Ann., Vol. 2, p. 639), since such argument has no reasonable basis unless the operation was exclusively interstate. If, for the legality of the levy of the State Excise Tax in the Beeler case, supra, this same operation by the Memphis Natural Gas Company was one in intrastate commerce, as the U. S. Supreme Court in the Beeler case held it was, it is an intrastate operation here, since it is the same operation. The inspec-

tion fees here in question, were imposed for three years of that operation.

"There have been changes and developments in the Company's method of business since that date, but those changes are not relevant to the inquiry here. The fact that the Company, since the imposition of the inspection fees, has made application and been put under control of the Federal Power Commission, can not affect our decision of this case,—on facts occurring before Federal control was effective. Furthermore, Federal control of the Natural Gas Industry as it exists today, is not exclusive of State control but concurrent with it.

> " 'The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere.' Public Utilities Com. v. United Fuel Gas Co., 317 U. S. 456, 467, 87 L. Ed. 396, 402.'

"The first three sub-sections of the assignment of error are overruled, and we hold that in its operation during the three years preceding April 1, 1939, the Gas Company was a public utility, subject to regulation and control by the Railroad and Public Utilities Commission, and subject to all statutes of Tennessee having to do with public utilities." (Opinion of Supreme Court of Tenn., Tr. pp. 242-243.)

The Federal Natural Gas Act was enacted on June 21, 1938. The period of time for which the appellant was held liable to pay inspection fees in the present suit was from April 1, 1936 to March 31, 1939. So, if it were to be found that the Federal Natural Gas Act deprived Tennessee of the right to regulate the activities of the appellant in

engaging in the distribution of natural gas together with the Memphis Power and Light Company, to the inhabitants of Memphis, Tennessee, still, the appellant would only be entitled to relief for a period of from June 21, 1938 to March 31, 1939. Just what part of the appellant's gross income was earned during this period does not appear in the record. Certainly, the obligation is on the appellant to present a record in condition so that errors complained of may be corrected.

It is further contended by the appellant in its statement as to jurisdiction that the decision of the Supreme Court of Tennessee in the case of the *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn., 688 necessitates a decision of the present case contrary to the result reached.

In reply to this contention it is respectfully submitted that the Supreme Court of Tennessee should be accepted as the final arbiter of any question concerning the effect and application of its own opinions. Such has always been the rule. If the Supreme Court of Tennessee was of the opinion that the *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. 688 did not in any wise apply to the present case then its decision in this regard should not be disturbed.

However, consideration of this contention of the appellant reveals that it is without merit. The question in *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. 688 was whether the Memphis Natural Gas Company was liable to pay a privilege tax assessed against gas distributing companies. The facts of the case were that sometime after March 31, 1939, the end of the period involved in this suit, the Memphis Natural Gas Company severed its contractual relationship with the Memphis Power and Light Company whereby it had engaged with that Company in the retail sale of natural gas to consumers in Memphis, Tennessee.

Thereafter, Tennessee collected from the Memphis Natural Gas Company the gross receipts privilege tax assessed by Chapter 108 of the Public Acts of Tennessee for the year 1937, for a period of time during which it had no contractual relationship with any concern whereby it distributed gas, it being engaged solely in the sale of gas at wholesale during this period of time. The Supreme Court of Tennesssee held that in as much as Memphis Natural Gas Company no longer had any contractual relationship whereby it was engaging in the retail sale of gas that it was not liable for the gross receipts tax levied under the chapter and Public Act just referred to. We quote from this opinion:

> "(1) Upon these facts we do not think it can be said that the complainant is distributing natural gas or is a distributor of natural gas in Tennessee. The Supreme Court of the United States has had frequent occasion in recent years to consider the tax liability to the different States of those engaged in the transmission and distribution of natural gas. In general, under the decisions of that Court, the transmission of natural gas from one State to another and its sale at wholesale at the State of destination has been held to be interstate commerce upon which the States could lay no burden. If the interstate carrier, however, undertook in the State of destination to distribute and sell the gas at retail, the latter activity was said to be local in its nature and not protected as interstate commerce. Of course a service company which took the gas from the pipes of the interstate carrier and sold and distributed the same was liable to State taxation and regulation. Leading cases from which the foregoing rules are derived are *Public Utilities Commission* v. *Landon*, 249 U. S., 236, 39 S. Ct., 268, 63 L. Ed., 577; *State of Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S., 298, 44 S. Ct., 544, 68 L. Ed., 1027; *Public Utilities Commission* v. *Attleboro Steam, etc. Co.*, 273 U. S., 83, 47 S. Ct., 294, 71 L. Ed., 549; *East Ohio Gas Co.* v. *Tax Commission*,

283 U. S., 465, 51 S. Ct., 499, 75 L. Ed., 1171; *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S., 41, 52 S. Ct., 62, 76 L. Ed., 156; *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S., 148, 57 S. Ct., 696, 81 L. Ed., 970.

"All of the foregoing cases by the Supreme Court, except *Southern Natural Gas Corp.* v. *Alabama*, were decided prior to the enactment of the Public Acts of 1937. These decisions were familiar. It was understood from them that the transportation of natural gas from one State and its sale at the carrier's pipe to another was interstate commerce. But that the distribution of gas through service pipes in a particular locality and sale at the burner tips was intrastate commerce. That distributing the commodity was a local activity. It was well understood what the term distributor meant and we do not think that the complainant here was a distributor or was distributing natural gas in the sense of the statute *after the purchase of the properties of the Memphis Power and Light Company by the City of Memphis. Prior to that purchase the complainant was engaged in the joint enterprise of distribution of natural gas as appears from Memphis Natural Gas Co.* v. *Pope et al.*, 178 Tenn., 580, 161 S. W. (2), 211, *and the same case reported under the style of Memphis Natural Gas Co.* v. *Beeler*, 315 U. S., 649, 62 S. Ct., 857, 86 L. Ed., 1090."

Memphis Nat. Gas Co. v. *McCanless*, 180 Tenn., 688, 691-693.

It will be observed that in this opinion to which the appellant refers with great reliance, that the Supreme Court of Tennessee reiterates its conclusion in *Memphis Natural Gas Company* v. *Pope*, 178 Tenn., 580, to the effect that the complainant, under its contract with Memphis Power and Light Company was engaged in the joint enterprise of the distribution of natural gas in Memphis.

Another ground of complaint mentioned by appellant in its statement as to jurisdiction is that the Supreme Court of Tennessee was without justification in holding that the appellant was operating under privileges and franchises from the City of Memphis and certain counties in Tennessee and the State of Tennessee. In the statement as to jurisdiction it is said: "It is undisputed that the pipe line corporation holds no franchise from the City of Memphis to distribute gas."

To the contrary of this the Supreme Court of Tennessee, in *Memphis Natural Gas Co.* v. *Pope,* 178 Tenn., 580, 591, found and held as follows:

> "There is filed copy of the franchise granted by the City of Memphis to the Memphis Power and Light Company until January 1, 1958. This franchise shows that the contract between the pipe line corporation and the grantee is filed with the city and contemplates the cooperation of the two concerns, and provides a scale of rates to the consumers for gas. It is in this way indicated that the city is a contracting party with both these utility corporations."

From the foregoing quotation it should plainly appear, according to the appellant's own evidence, that the franchise though executed in the name of the City of Memphis to the Memphis Power and Light Company must, in fact, be deemed and treated as a franchise contract between the City of Memphis and the Memphis Power and Light Company and Memphis Natural Gas Company. So, the Memphis Natural Gas Company did have a franchise from the City of Memphis as found by the Supreme Court of Tennessee.

It is stated that the Tennessee courts erred in finding and holding that the appellant was operating under franchises and privileges from seven West Tennessee counties.

By way of reply to this contention the Honorable Court's attention is directed to the exhibits to the deposition of appellant's witness, A. C. Dearth, which appear in the transcript at pages 168-209. These exhibits sustain the finding of the Supreme Court of Tennessee. According to the Tennessee decisions, which are in line with the decisions from all other jurisdictions, the right to lay pipes in and along the public highways constitutes of itself a franchise. (See *Nashville Water Co.* v. *Dunlap*, 176 Tenn., 84.)

It is further contended that the appellant had and enjoyed no franchise from the State of Tennessee.

It is admitted that the appellant became domesticated in Tennessee, and the courts of Tennessee and this Supreme Court of the United States have found that the appellant engaged in the distribution of gas to retail consumers in Memphis. Under the Tennessee decisions the exercise by a foreign corporation of the privilege of domestication in Tennessee and the subsequent engaging in a public service type enterprise brings the corporation and the State of Tennessee into a franchise relationship. See *Tennessee Eastern Electric Company* v. *Hannah*, 157 Tenn. 582.

Appellant's statement as to jurisdiction concludes with this, "It is not appellant's insistence that the state statutes are unconstitutional in toto, but are unconstitutional as applied to the undisputed facts and this appellant."

Our reply to this proposition is that while the facts are undisputed, being stipulated in large part, the appellant has wholly misconceived the effect of the stipulated facts. The state courts have not unconstitutionally applied the statutes involved. Possibly, the only way in which the state courts could have misapplied the statutes involved to the Memphis Natural Gas Company would have been to have held that the statutes in question applied to the appel-

lant as an interstate importer of natural gas. If the state courts had given the statutes in question such an application then undoubtedly the present appeal could be sustained as an appeal rather than as a petition for writ of certiorari. But such is not the case. The statutes in question have not been given any such warped application. The statutes purport to apply only to public service corporations furnishing intrastate products and services. This is the application given to the statutes by the Supreme Court of Tennessee. Actually the appellant's insistence is that the state courts have erred in determining the effect of the stipulated evidence. But, it is respectfully submitted that such is not the case.

It is respectfully submitted that grounds Nos. 2 and 3 of this motion to dismiss should be sustained. In any aspect of the case, whether treated as an appeal or a petition for a writ of certiorari, the appellant has not been denied the benefit of any constitutional immunities to which it is entitled nor has any state statute been unconstitutionally applied to it. Wherefore, appellees pray that their motion to dismiss be sustained.

Respectfully submitted,

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